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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1931

BROOKLYN EASTERN DISTRICT TERMINAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	10

CITATIONS

Cases:	
Tax Commissioner v. *Jackson*, 283 U. S. 527	4
The Cayuga, 7 Blatch. 385, affd., 14 Wall. 270	6
The Conqueror, 116 U. S. 110	7
The Favorita, 18 Wall. 598	6
The Glendola, 47 F. (2d) 206, certiorari denied, 283 U. S. 857	7, 8
The Priscilla, 55 F. (2d) 32, petition for certiorari pending, *sub nom. Doane-Commercial Towing Co.* v. *Mexican Petroleum Corp.*, No. 903, Oct. Term, 1931	8, 9
Statutes:	
Act of February 16, 1925, c. 241, 43 Stat. 1566	2

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No. 877

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 291–294) is reported in 54 F. (2d) 978. Portions of the report of the Special Commissioner appointed to assess damages (R. 266–271) and of the opinion of the District Court confirming his report (R. 275–278), are reported in 1931 A. M. C. 341–347.

JURISDICTION

The judgment sought to be reviewed was entered January 18, 1932. (R. 294.) Petition for certiorari was filed April 15, 1932. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether demurrage should be allowed for the period a damaged tug, engaged with two other tugs belonging to the same owner in towing car floats, is withdrawn from service for repairs, when the other two tugs did all the towing formerly done by the three.

STATUTE INVOLVED

The Act of February 16, 1925 (c. 241, 43 Stat. 1566), provides as follows:

> That the claims of the Brooklyn Eastern District Terminal, a corporation organized and existing under the laws of the State of New York, with its principal place of business in the city of New York, in said State, owner of the tugboat Integrity, against the United States for damages alleged to have been caused by collision beween the said tugboat and the United States hopper dredge Raritan, in New York Harbor, New York, on or about the 30th day of September, 1920, may be sued for by the said Brooklyn Eastern District Terminal in the United States District Court for the Southern District of New York, sitting as a court of admiralty and acting under the rules governing such court, and said court shall have jurisdiction to hear and determine such suit and to enter a judgment or decree for the amount of such

damages and costs, if any, as shall be found due against the United States in favor of the Brooklyn Eastern District Terminal, or against the Brooklyn Eastern District Terminal in favor of the United States upon the same principles and measures of liability as in like cases in admiralty between private parties and with the same rights of appeal: *Provided,* That such notice of the suit shall be given to the Attorney General of the United States as may be provided by the order of the said court, and it shall be the duty of the Attorney General to cause the United States attorney in such district to appear and defend for the United States: *Provided further,* That said suit shall be brought and commenced within four months of the date of the passage of this Act.

Approved, February 16, 1925.

STATEMENT

A libel in admiralty was filed May 7, 1925, under authority of the Act of February 16, 1925, *supra,* in the District Court for the Southern District of New York by petitioner, as owner of the steam tug *Integrity,* against the United States, as owner of the dredge *Raritan,* to recover damages arising out of a collision between those vessels in New York Harbor on September 30, 1920. (R. 2–10.) A cross libel was filed to recover damages sustained by the *Raritan.* (R. 16–20.) The court, after receiving evidence, held both vessels at fault and de-

termined that the damages should be equally apportioned between the two owners. (R. 102.)

A Special Commissioner, appointed to determine the amounts of damages suffered by the parties (R. 103–104), after taking testimony (R. 105–185) and receiving other evidence (R. 186–265), made a report (R. 266–271), which included an item of $11,700 for demurrage for the period the *Integrity* was withdrawn from service for repairs (R. 270). He stated that during this period the other tugs of the petitioner had to work longer hours, undergoing excessive wear and tear, or else neglect available work. The demurrage was determined by taking the going market rate of hire for tugs, which was $15 an hour for a ten-hour day, for the seventy-eight days required for the repairing. (R. 270.) The District Court confirmed the report of the Commissioner as to the item for demurrage. (R. 276.) The Circuit Court of Appeals reversed the District Court as to demurrage and disallowed that item. (R. 294–295.) Whether this demurrage should have been allowed is the only question involved in the instant petition.

This libel was filed and the opinion of the District Court was rendered before Admiralty Rule 46½ (281 U. S. 773) became effective. Therefore, in the absence of specific findings, the proofs, which are not in dispute, may be summarized. Cf. *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 533.

The *Integrity* was used solely in petitioner's business, which consisted of acting in conjunction

with various railroads as a transfer medium in New York Harbor. Three tugs were used by petitioner for this work. (R. 115–117.) The *Integrity* was laid up for seventy-eight days while the damage resulting from the collision in question was being repaired. (R. 115.) During this period towage usually handled by the *Integrity* was handled by the other two of petitioner's tugs by working extra time, but without hiring additional crews. (R. 117, 118.) This practice was followed in preference to hiring an extra tug because it was believed to be more economical. (R. 119.) There was opinion testimony to the effect that the increased use of the two tugs tended to make them wear out more quickly, but it was stated that it was not possible to estimate the extra cost of this wear, although materially less than the cost of hiring an additional tug. (R. 119–120.) There was no definite evidence that either of the other two tugs had to be repaired after the *Integrity* returned to service because of the extra work or that petitioner incurred any other extra expense or lost any profit because of the *Integrity's* temporary removal from service. (R. 119–120.) The court below held that no extra expenses of overtime for the two tugs actually used had been proved. (R. 292.) The petitioner does not assert that such extra expense was proved.

ARGUMENT

This Court has held that if a boat is damaged so that it must be taken from regular service to be re-

paired, and another boat, maintained by the owner for such emergencies and not otherwise used, takes its place, demurrage may be recovered for the repair period as compensation for the expense of maintaining the extra boat. *The Cayuga,* 7 Blatch. 385, affirmed, 14 Wall. 270; *The Favorita,* 18 Wall. 598. This is known as the "spare boat" doctrine. It is based on the theory that, since expense would be incurred in hiring a boat for the emergency for which compensation would be allowed, it should also be allowed where a spare boat is kept by the owner so that it is not necessary to hire an outside boat. The demurrage in the latter case covers the extra cost of maintaining the spare boat.

Petitioner contends that, although it did not maintain a spare boat or hire an extra tug to help carry on its business while the *Integrity* was being repaired, it is entitled to demurrage for this period because its other two tugs were required to work overtime in order to do the towing ordinarily done by all three. No additional crews were hired, and there was no evidence that any extra expense was incurred or profits lost. It was admitted that it was more economical to work the two tugs overtime, as petitioner did, than to hire an additional tug at $150 a day for the repair period, although the rate of hire of tugs was the basis on which the demurrage, allowed by the Commissioner and the District Court, was computed. (R. 119.)

We believe that the decision of the court below, disallowing the demurrage item, was correct, be-

cause petitioner failed to prove the elements necessary for it to recover under the "spare boat" doctrine or to establish any other basis for allowance of demurrage. Where a spare boat is kept to take the place of the boat being repaired, its owner has actually incurred an additional expense in maintaining the extra vessel for emergency use and, under applicable decisions of this Court, he is entitled to be compensated. Likewise, if he has hired another boat from an outside owner he has suffered a loss which can be exactly computed and for which compensation should be awarded. If demurrage is sought for any other reason, it has been settled by this Court that it will be allowed only when expense has actually been incurred or a profit lost, and this has been shown with reasonable certainty. The mere detention of a vessel while being repaired does not give rise to demurrage. *The Conqueror,* 166 U. S. 110, 125; *The Glendola,* 47 F. (2d) 206 (C. C. A. 2d), certiorari denied, 283 U. S. 857.

In the instant case the only extra loss claimed was that resulting from the additional wear and tear resulting to the two tugs because of the additional time they were engaged each day. Petitioner's witness Kilpatrick, when asked for his opinion of the amount of such wear and tear, stated that it was impossible to estimate it. (R. 119.) No evidence was submitted as to any subsequent repairs or reconditioning of the two tugs, or to show that their useful lives had been shortened by the extra burden cast upon them while the *Integrity* was tem-

porarily out of service, although ten years had elapsed between the time of the repairs to the *Integrity* and the hearings before the Commissioner. (R. 120.) Under these circumstances the proof of loss from wear and tear was, at most, conjectural, and there is nothing in the record tending to show with reasonable certainty the amount of such loss, if there has been any. Consequently it is clear under the settled principles of law announced by this Court that a basis for recovering demurrage has not been established. The petitioner was not entitled to collect the cost of chartering a tug which it did not charter, nor to recover the value of the use of a "spare boat" which it did not maintain. The court below recognized the authority of the decisions of this Court applying the "spare boat" doctrine, but correctly held those decisions inapplicable and applied the principles announced in another decision of this Court and in one of its own recent decisions which this Court declined to review (*The Glendola, supra*), to the particular facts of this case.

Petitioner asserts that the decision of the court below is in conflict with that of the Circuit Court of Appeals for the First Circuit in *The Priscilla*, 55 F. (2d) 32, petition for certiorari now pending as *Doane-Commercial Towing Co.* v. *Mexican Petroleum Corp.*, No. 903, October Term, 1931. The petition in that case also alleges a conflict between the decisions of the two courts. We believe that the cases are distinguishable and represent the

application of the same principles to different sets of facts. In the *Priscilla* case a barge ordinarily used in the New York business of its owner was brought to Boston Harbor to be temporarily substituted for a damaged barge to do a part of the owner's business handled at Boston. Recovery of demurrage was allowed to the owner for the period during which the substituted barge was used or in transit to Boston. The court in that case pointed out (*supra,* p. 38) that, whereas the owner was able to handle all its Boston business by using the substituted barge, it was a fair inference that the substituted barge, if left in New York during the period of substitution, would not have been an idle boat but would have been profitably employed. It thought the evidence justified such a finding, and it so found. If this were true it is clear that in bringing the barge to Boston the owner lost profits which it would have earned if the barge had been left in New York. Accordingly, the elements necessary for allowing demurrage as pointed out above were shown. The crux of all the cases in which demurrage is sought by invoking the "spare boat" doctrine is whether or not proof of actual loss and the amount thereof are shown with a fair degree of certainty. We believe this proof had not been made in the instant case. The Circuit Court of Appeals for the First Circuit made a finding that there had been ascertainable loss in the *Priscilla* case. This difference distinguishes the two decisions.

CONCLUSION

The decision below is correct. It conforms to the principles laid down by this Court, and we believe that there is no conflict of decisions. The decision turned upon the application of settled rules to the particular facts in this case. The petition should be denied.

Respectfully submitted.

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